

**In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.
BPRA Docket No. 94-0001.
Ruling Denying Complainant's Motion to Lift Stay filed January 4, 2001.**

Sharlene A. Deskins, for Complainant.
David R. Klaassen, Marquette, Kansas, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

On November 3, 1997, I issued a Decision and Order: (1) concluding that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent], willfully violated the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316) [hereinafter the Beef Order]; (2) ordering Respondent to cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Act] and the Beef Order; (3) assessing Respondent a civil penalty of \$69,244.51; and (4) ordering Respondent to pay past-due assessments and late-payment charges of \$66,577 to the Kansas Beef Council. *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997).

On November 12, 1997, Complainant filed Complainant's Motion for Reconsideration, and on November 17, 1997, Respondent filed a Petition for Reconsideration of the Decision of the Judicial Officer. On April 3, 1998, I issued an Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration. *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). Based on my granting Complainant's Motion for Reconsideration in part, I did not reinstate the Order in the Decision and Order issued November 3, 1997, but, instead, issued a new Order: (1) ordering Respondent to cease and desist from violating the Beef Act and the Beef Order; (2) assessing Respondent a civil penalty of \$69,804.49; and (3) ordering Respondent to pay past-due assessments and late-payment charges of \$66,913 to the Kansas Beef Council. *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.).

On June 22, 1998, Respondent filed a Motion for an Order Staying Enforcement [hereinafter Motion for a Stay] requesting a stay pending proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and pending final disposition of Respondent's appeal of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996).

On June 24, 1998, the Acting Administrator, Agricultural Marketing

Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to Motion for an Order Staying Enforcement stating "Complainant does not oppose the staying of the sanctions imposed by the Judicial Officer in [*In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.)]."

On June 25, 1998, I issued a Stay Order granting Respondent's Motion for a Stay pending the outcome of proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and pending final disposition of Respondent's appeal of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996). *In re Jerry Goetz*, 57 Agric. Dec. 445 (1998) (Stay Order).

Goetz v. Glickman, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), is concluded. However, proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), are not concluded. The United States District Court for the District of Kansas affirmed *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). See *Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000). On June 14, 2000, Respondent filed a notice of appeal of the district court decision with the United States Court of Appeals for the Tenth Circuit. *Goetz v. United States*, No. 00-3173 (10th Cir. June 14, 2000).

On November 20, 2000, Complainant filed a Motion to Lift Stay. On December 21, 2000, Respondent filed Respondent's Objections to Complainant's Motion to Lift Stay, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Complainant contends the June 25, 1998, stay should be lifted because: (1) the public interest is not served by continuing the stay; (2) lifting the stay will not cause irreparable harm to Respondent; and (3) Respondent is extremely unlikely to prevail in his appeal to the United States Court of Appeals for the Tenth Circuit (Motion to Lift Stay at 2-4).

Complainant contends the public interest is not served by the June 25, 1998, stay because "there is a perception that the Respondent is attempting to avoid paying anything by continuing these proceedings as long as possible." Complainant asserts "[t]his perception encourages people to use legal proceedings as a mechanism to avoid paying assessments [required by the Beef Act and the Beef Order] . . . and affects the ability of [the Agricultural

Marketing Service] to obtain compliance with the Beef Act and [the Beef] Order. A stay issued by the Judicial Officer should not be used as a tool that a respondent can utilize to give him time and opportunity to shelter his assets so as to avoid paying assessments.” (Motion to Lift Stay at 2.)

Complainant cites no instance in which persons have used legal proceedings to avoid paying assessments required by the Beef Act and the Beef Order. Since the issuance of the June 25, 1998, Stay Order, only one disciplinary administrative proceeding concerning violations of the Beef Act and the Beef Order has been appealed to the Judicial Officer.¹ The dearth of cases appealed to the Judicial Officer indicates that the June 25, 1998, Stay Order has not encouraged a significant number of people to use legal proceedings as a mechanism to avoid paying assessments required by the Beef Act and the Beef Order, as Complainant contends.

Moreover, Complainant cites no basis for the assertion that the June 25, 1998, Stay Order has affected the ability of the Agricultural Marketing Service to enforce the Beef Act and the Beef Order. The affidavit attached to Complainant’s Motion to Lift Stay does not indicate that violations of the Beef Act and the Beef Order attributable to the June 25, 1998, Stay Order are occurring. Instead, the affiant merely speculates about possible future violations stating that the Kansas Beef Council’s inability to collect assessments, late fees, and penalties from Respondent would encourage future non-compliance with the Beef Act and the Beef Order (Matt Teagarden’s Affidavit ¶ 7).

Therefore, I find no merit in Complainant’s contention that the June 25, 1998, Stay Order is adversely affecting the public interest.

Complainant also contends lifting the stay will not cause Respondent irreparable harm (Motion to Lift Stay at 3-4).

Monetary loss, even where substantial, does not, in and of itself, cause irreparable harm.² However, monetary loss may constitute irreparable harm where the loss threatens an ongoing business with destruction as opposed to mere disruption.³ Complainant asserts, but does not provide support for finding,

¹ See *In re Jeanne and Steve Charter*, 59 Agric. Dec. 650 (2000).

² *Mid-States Ag-Chem Co. v. Atchison Grain Co.*, 750 F. Supp. 465, 467 (D. Kan. 1990); *In re David R. Hostetter*, 52 Agric. Dec. 366, 368 (1993) (Order Lifting Stay Order).

³ *Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986); *Otero Savings & Loan Ass’n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981); *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980); *Sprint Corp. v. DeAngelo*, 12 F. Supp.2d 1188, 1194 (D. Kan. 1998); *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1181 (D. Kan. 1988); *In re David R. Hostetter*, 52 Agric. Dec. 366, 368 (1993) (Order Lifting Stay Order).

Respondent will only suffer a monetary loss. Respondent asserts payment of \$136,717.49 required by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), would result in the destruction of Respondent's business (Respondent's Objections to Complainant's Motion to Lift Stay ¶ 5). Based on my review of the record, I find Respondent's payment of \$136,717.49 in accordance with the April 3, 1998, Order would threaten Respondent's ongoing business with destruction. Therefore, I find that lifting the June 25, 1998, stay would cause Respondent irreparable harm.

Moreover, Complainant asserts, if the immediate payment of the civil penalty is sufficient to cause Respondent irreparable harm, the stay is still not necessary because the Judicial Officer can modify the Order issued in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), to allow Respondent to pay the civil penalty in installments (Motion to Lift Stay at 3-4).

I reject Complainant's contention that modification of the April 3, 1998, Order to allow Respondent to pay the \$69,804.49 civil penalty in installments would be sufficient to eliminate the threat of destruction of Respondent's ongoing business. In addition to the civil penalty, the April 3, 1998, Order requires Respondent to pay the Kansas Beef Council past-due assessments and late-payment charges totaling \$66,913. Based on my review of the record, Respondent's payment of past-due assessments and late-payment charges totaling \$66,913 in accordance with the April 3, 1998, Order would threaten Respondent's ongoing business with destruction. Therefore, even if I modified the April 3, 1998, Order as urged by Complainant, lifting the June 25, 1998, stay would cause Respondent irreparable harm.

Moreover, I deny Complainant's request that I modify the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). The modification of the April 3, 1998, Order urged by Complainant would not adversely affect Respondent. Further, a modification of the April 3, 1998, Order to allow Respondent to pay the \$69,804.49 civil penalty in installments might be crafted so that it is not a significant modification. Nonetheless, I am reluctant to disturb any order while it is the subject of judicial review. Generally, courts should not be presented with a "moving target" when reviewing an order.

Complainant is free to renew the request to modify the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), to allow Respondent to pay the civil penalty in installments if, after proceedings for judicial review have been concluded, the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for

Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), is affirmed.

Complainant further contends irreparable harm cannot be construed as applying to the non-monetary sanctions in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.) (Motion to Lift Stay at 4).

The only non-monetary sanction in the April 3, 1998, Order requires Respondent to cease and desist from violating the Beef Act and the Beef Order. *In re Jerry Goetz*, 57 Agric. Dec. 426, 444-45 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). Complainant asserts Respondent has used the June 25, 1998, stay of the cease and desist provisions of the April 3, 1998, Order as an excuse to violate the Beef Act and the Beef Order. However, Complainant also asserts Respondent violated the Beef Act and the Beef Order during the entire period between the date Complainant filed the Complaint, October 29, 1993, and the date Complainant filed the Motion to Lift Stay, November 20, 2000 (Motion to Lift Stay at 4; Matt Teagarden's Affidavit ¶¶ 3-5). Therefore, I reject Complainant's assertion that Respondent has used the June 25, 1998, Stay Order as an excuse to violate the Beef Act and the Beef Order.

The June 25, 1998, stay of the cease and desist provisions of the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), does not in any way make the Beef Act and the Beef Order inapplicable to Respondent. If Complainant has *prima facie* evidence that Respondent violated the Beef Act and the Beef Order during the period between October 29, 1993, and November 20, 2000, Complainant may institute an administrative proceeding against Respondent for violations of the Beef Act and the Beef Order that are not the subject of this proceeding.

Finally, Complainant asserts that, in light of the decision in *Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000), affirming *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), "it is extremely unlikely that the Respondent will succeed in his appeal to the 10th Circuit." (Motion to Lift Stay at 4.)

A respondent need not establish a high probability of success on the merits in order to be granted a stay. The probability of success that must be shown to justify a stay is inversely proportional to the degree of irreparable harm a respondent will suffer absent a stay. Thus, a stay may be granted by showing

either a high probability of success on the merits and some injury or *vice versa*.⁴ I have applied this same principle to determine whether to grant Complainant's Motion to Lift Stay.

In my view, *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and *Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000), are correctly decided. I do not find that there is a high probability that Respondent will succeed on the merits in his appeal to the United States Court of Appeals for the Tenth Circuit. However, I do not lift the June 25, 1998, stay. The record establishes that Respondent has some probability of success on the merits, and, as discussed in this Decision and Order, *supra*, the record establishes that lifting the June 25, 1998, stay would cause Respondent substantial and irreparable harm.

I have considered the following factors: (1) the threat of irreparable harm to Respondent posed by lifting the June 25, 1998, stay; (2) the state of balance between the harm that lifting the June 25, 1998, stay would cause Respondent and the injury that maintaining the June 25, 1998, stay causes Complainant; (3) the probability that Respondent will prevail on appeal to the United States Court of Appeals for the Tenth Circuit; and (4) the public interest in lifting the June 25, 1998, stay. After considering these four factors, I conclude, based on the record before me, that the June 25, 1998, Stay Order should not be disturbed.

For the foregoing reasons, I deny Complainant's November 20, 2000, Motion to Lift Stay.

⁴ See generally *Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987); *Cumo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam).